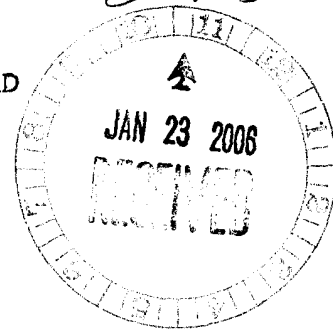


BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34818

Rails to Trails Conservancy,
Jersey City, and
Pennsylvania Railroad Harsimus Stem
Embankment Coalition --
Petition for a Declaratory Order

ENTERED
Office of Proceedings

PETITIONERS CITY OF JERSEY CITY, ET AL'S
OPPOSITION TO
INTERVENOR 212 MARIN BOULEVARD, ET AL'S
"PETITION FOR EXTENSION OF TIME"

JAN 23 2006

Part of
Public Record

While petitioners City of Jersey City, et al. (hereinafter "Jersey City") do not oppose intervention in this proceeding by 212 Marin Boulevard, et al (intervenors are hereinafter referred to as "SLH Properties" or "the developer"),¹ Jersey City underscores its opposition and objection to any extension of time for the developer (or anyone else) to file a reply.

As made clear below, at the same time the developer's attorneys were drafting their request for an extension, the developer was initiating demolition of structures relating to the Harsimus Embankment. No party should expect to get an extension when they at the same time are so blatantly using any

¹ On January 20, 2006, 212 Marin Boulevard, LLC; 247 Manila Boulevard, LLC; 280 Erie Street, LLC; 317 Jersey Avenue, LLC; 354 Coles Street, LLC; 389 Monmouth Street, LLC, 415 Brunswick Street, LLC, and 446 Newark Avenue, LLC (which state that they refer to themselves collectively as "SLH Properties") filed a petition to intervene. All the SLH Properties have common ownership (namely, developer Steven Hyman).

time made available to them for the purpose of actively destroying the very assets that are the point of the proceeding in which they seek the extension.

No extension of any sort should be allowed unless this Board issues an order preserving the status quo, or conditions the extension upon such an order.

INTRODUCTION

Background. This proceeding raises the question whether Consolidated Railroad Corporation (Conrail) illegally abandoned the Harsimus Branch railroad line between MP 1.3 (near Luis Munoz Marin Blvd., formerly Henderson Street) and MP 2.54 (near Waldo Avenue) in the City of Jersey City, in violation of 49 U.S.C. § 10903. The portion of railroad line at issue contains the Harsimus Embankment (also known as the Sixth Street Embankment). The Embankment is a structure which not only is listed on the New Jersey Register of Historic Places² but also has been determined eligible for listing on the National Register of Historic Places.³

Conrail never sought abandonment authority from this Board prior to selling the segment of line containing the Embankment to the developer, who seeks to tear it down and subdivide it for

² See Letter, D. Guzzo to Conrail, Jan. 25, 2000 (Embankment "was entered onto the New Jersey Register of Historic Places on December 29, 1999"), second document in Appendix I to Jersey City's Petition for a Declaratory Order.

³ The only reason it was not listed on the National Register is that the then-owner (Conrail) objected. See Verified Statement of Richard James, ¶2 (attached as Exhibit E to Jersey City's Petition for a Declaratory Order).

houses. Had Conrail sought abandonment approval, it would have had to comply with section 106 of the National Historic Preservation Act, 16 U.S.C. § 470f, before exercising any authority to abandon the line. Certainly there could have been no demolition prior to compliance with section 106.

STB's e-library records Jersey City's petition as filed on January 13, 2006. At the very same time the developer's attorneys were preparing their motion for an extension of time (which they filed on Friday, January 19), the developer's construction personnel began removing old stone piers and stanchions from the property. This action must be viewed in the context of the developer's standard no-hold's-barred practice of denying any City request for additional time in state court litigation, while pushing forward on the ground "in the hope he can just outrun any opposition"⁴ in respect to leveling the Harsimus Embankment and breaking up this railroad line into little housing developments. Further factual detail is set forth in the Verified Statement of John J. Curley, set forth in full below and incorporated herein as Jersey City's statement of facts.

⁴ Verified Statement of John J. Curley, infra, ¶8, penultimate line.

ARGUMENT

No extension of time should be granted absent a stay maintaining the status quo. In cases involving disputes over the need for authority or for a particular kind of authority from this Board, this Board frequently grants, at the behest of an interested party, a "housekeeping" stay to maintain the status quo pending further consideration,¹ without the need to make the traditional showings under Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977) ("WMATA") and Virginia Petroleum Jobbers Association v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Those showings bear on (i) probability of success on the merits, (ii) irreparable injury to the moving party absent a stay, (iii) lack of commensurate harm to the other side, and (iv) public interest in favor of a stay.

As a matter of course, this Board should enter a housekeeping stay prohibiting further demolition and thus preserving the status quo here. In any event, Jersey City has more than met the requirements for a stay under WMATA.²

1. Probability of success on the merits. Jersey City has demonstrated probability of success on the merits. Conrail is

¹ For example, in this Board's recent decision in City of Alameda -- Acquisition Exemption -- Alameda Belt Line, FD 34798, served Dec. 15, 2005, the Board issued a housekeeping stay to maintain the status quo pending further efforts by the parties to set forth their positions.

² The developer has submitted to the jurisdiction of this Board by intervening. See also 49 U.S.C. § 721(b)(4).

obligated to obtain abandonment authority for railroad lines pursuant to 49 U.S.C. § 10903; Conrail cannot unilaterally reclassify railroad lines as spurs on the basis of more recent non-use. Jersey City's Petition establishes that the Harsimus Branch was unequivocally a railroad line (it was the main line of freight into the Pennsylvania Railroad's Jersey City freight transshipment terminal) and that it continued in rail use under Conrail, gradually diminishing until the early 1990's.

As indicated in Jersey City's Petition at more length, under applicable precedent (e.g., Chelsea Property Owners-- Abandonment -- Portion of the Consolidated Rail Corporation's West 30th Street Secondary Track in NY, NY, 8 ICC2d 773, AB 167 (Sub-no. 1094), served Sept. 16, 1992, aff'd sub nom. Consolidated Rail Corp. v. ICC, 29 F.3d 706 (D.C. Cir. 1994)), the Harsimus Branch is accordingly a railroad line.

Although Conrail must obtain abandonment authority for the Branch, Conrail did not. See Strauss Verified Statement, Exhibit D to Jersey City's Petition. Moreover, Conrail's General Counsel conceded that Conrail did not obtain abandonment authority in a telephone conversation with counsel for Jersey City the day before Jersey City tendered its Petition to STB for filing. Jersey City is likely to prevail on the merits.

2. Irreparable injury to Jersey City and the public. While the destruction of an ordinary structure might be remediable by the payment of damages, the demolition of historic structures is not. Destruction of an historic structure

constitutes an irrevocable commitment (in the form of elimination) of a resource. "The act of demolition is irrevocable. Consideration of alternative plans ... is permanently foreclosed once the structures have been razed." Boston Waterfront Residents Association v. Romney, 343 F.Supp. 89, 91 (D. Mass. 1972). As the Second Circuit noted in affirming the grant of an injunction against the demolition of an historic structure, "the district judge was surely correct in finding irreparable injury; demolition is generally irreparable." WATCH v. Harris, 603 F.2d 310, 312 n.2 (2d Cir. 1979). See also Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 282 (3d Cir. 1983) (upholding injunction against demolition pending compliance with section 106). The developer threatens destruction of not only the historic Harsimus Embankment but also the ancillary old stone stanchions. He has demonstrably started his engines in that regard, taking out an old stone stanchion or pier even as his attorneys crafted their motion for an extension of time last week. See V.S. of John J. Curley, supra, part of our statement of facts. As Mr. Curley makes clear, further destruction of the old stone stanchions is expected. Moreover, as Jersey City explained in its Petition, the developer in state court is seeking to compel the local Planning Board to issue required permits without regard to this Board's jurisdiction. Petition at 27. Once those permits are issued, the developer will presumably launch his bulldozers on the Embankment itself. In

the circumstances, the delay sought by the developer here is merely cover for the infliction of irreparable injury on Jersey City and the public.

3. Lack of commensurate harm to others. Conrail and the railroad industry in general will sustain no harm from a stay. Conrail has no financial interest left in the Embankment, having already deeded it to (and having already been paid by) the developer.³ The developer will sustain no legally cognizable harm, for there has been no compliance with section 106 with respect to any part of the old Embankment, including the old stone stanchions now being assaulted. In any event, any harm to the developer will be limited to a brief delay while this Board considers the issues, and the length of that delay is at least partly in control of the developer, who, ironically, is the very party that has requested slower procedures of the Board.⁴

4. Public interest. Congress has declared the public interest here: that is compliance with section 106 of the NHPA. In any event, Jersey City wishes to acquire the property at issue for rail (light rail) and open space purposes. See Curley V.S., supra, at ¶ 6; see also Exhibit C to Petition (Curley V.S.) ¶ 6. The City's ordinances declare the public interest

³ Moreover, the City is prepared to pay Conrail the amount Conrail was paid by the developer should Conrail obtain requisite abandonment authority so the property may lawfully be sold.

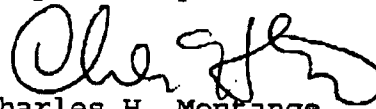
⁴ It is certainly relevant to note that Jersey City asked for expeditious treatment (both in its cover letter to the filing and in its Petition at pp. 26-27).

in favor of preservation of the very structures under assault by the developer. See Exhibit G to Jersey City's Petition.

Conclusion

No extension of time should be granted the developer (or any other party) for filing a reply unless a housekeeping stay is entered barring further destruction of the property, at least until this Board issues a final decision in this proceeding.

Respectfully submitted,



Charles H. Montange
Attorney for petitioners
City of Jersey City,
Rails to Trails Conservancy,
PRR Harsimus Stem Embankment
Preservation Coalition,
and Assemblyman Louis M. Manzo

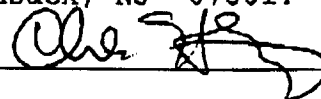
426 NW 162d St.
Seattle, WA 98177
(206) 546-1936
fax: -3739

Of counsel for
Rails to Trails Conservancy

Andrea Ferster
Rails to Trails Conservancy
1100--17th St., N.W., Tenth Fl.
Washington, D.C. 20036

Certificate of Service

I hereby certify service on January 23, 2006, by placing copies of the foregoing petition with an express service, next business day delivery, addressed to Jonathan Broder, VP/General Counsel; David C. Ziccardi, Associate General Counsel, Consolidated Rail Corp., 2001 Market St., 8th Fl., Philadelphia, PA 19103, and to Carmine R. Alampi, Alampi & Demarrais, One University Plaza, Suite 404, Hackensack, NJ 07601.



BEFORE THE SURFACE TRANSPORTATION BOARD

Finance Docket No. 34918

Rails to Trails Conservancy,
Jersey City, and
Pennsylvania Railroad Harsimus Stem
Embankment Coalition, petitioners --
Petition for a Declaratory Order

VERIFIED STATEMENT OF
JOHN J. CURLEY

I, John J. Curley, make this Verified Statement in opposition to the developer's request for a 20 day extension to respond to the Petition for a Declaratory Order filed by petitioners the City of Jersey City, et al. in the above-captioned proceeding.

1. I am special counsel for the City of Jersey City, Jersey City Historic Preservation Commission and Joanne Monahan (Assistant City Counsel) in litigation brought by eight limited liability companies controlled by developer Steven Hyman (the "Developer") who claims to hold property interests acquired by from Conrail to the portion of the Harsimus Branch containing the Sixth Street Embankment.

2. A Petition has been filed with the Surface Transportation Board for a declaratory judgment that the Surface Transportation Board has jurisdiction over the railroad property at issue in this proceeding.

3. The Developer is seeking a 20 day extension of time in

which to respond to the Petition.

4. The Developer proposes to develop the Embankment property for residential purposes through the construction of one and two family homes, which is in accordance with the zoning of the area. The construction of the residential units necessitates the demolition of the remaining railroad structures and the embankment as the homes are to be constructed at grade.

5. The Developer has filed several site plan and subdivision applications with the Planning Board of the City of Jersey City for the residential development. The applications before the Planning Board have been prosecuted with the threat of an automatic approval in the event of delay of decision beyond the statutory time period for planning board action. Moreover, a court order prevented the Planning Board from denying the application as to the property located on Monmouth Street between Fifth and Sixth Streets on the basis of possible Federal jurisdiction. This parcel is designated as Block 415, Lot 50 on the Jersey City tax assessment map. Record title to the parcel is held by 415 Brunswick Street, L.L.C. by a quitclaim deed from Conrail made without a termination of Surface Transportation Board jurisdiction. Within the last five days, and after service of the Petition for Declaratory Relief upon the developer, the developer has demolished and removed a stone pier railroad structure from this parcel.

6. The old stone railroad pier or stanchion was demolished

as part of site preparation on the parcel for a change to non-rail use. This pier or stanchion would probably have been reused if a light rail system were to be built on the right of way as contemplated by the City of Jersey City.

7. If the Developer is granted the requested extension, these construction activities will likely continue. One additional stone pier is on the parcel in question. Furthermore, there are approximately seven more piers or stanchions which formerly supported rail tracks on the adjacent parcel on Newark Avenue (Block 446, Lot 18A) that Conrail conveyed by quitclaim deed to the same developer under the name of 446 Newark Avenue, L.L.C. These pier structures are not protected by historic landmark designation, but are clearly structural components of the elevated rail system leading to the embankment running along Sixth Street and were in use until at least 1992. Unless restrained, the developer would be able to demolish and remove these rail structures before submitting an answer to the pending Petition.

8. The Developer has refused to grant the City of Jersey City any extensions of time to reply to summary judgment motions filed in pending state court actions. The purpose of these motions has been to obtain approvals for subdivision and demolition activities in order to establish non-rail use of the land purchased from Conrail without termination of the Surface Transportation Board's jurisdiction. It is my belief that the developer and

Conrail intentionally delayed the City of Jersey City's appraisal inspections to slow down the City's acquisition process. For example, a letter from Conrail's attorney on June 17, 2005 promised access for appraisal inspections after July 13, 2005 stating that Conrail was in the process of moving its offices in New Jersey and needed time. However, Conrail delivered the quitclaim deeds to the developer on July 12, 2005 without notifying the City that it was about to complete a sale of the properties. It was only in reply to a follow up appraisal inspection request that Conrail's attorney wrote on July 18, 2005 that the property had been sold. The developer then refused the City access to conduct its appraisal inspection. The City of Jersey City was forced to apply to the court for an order against the developer for access. The land use approval litigation in the state court was then commenced by the developer. The entire strategy being pursued by the developer is based upon speed in the hope that he can just outrun any opposition.

9. Since its acquisition of the properties, the developer has never provided any proof to the City that the property has undergone abandonment proceedings before the Surface Transportation Board or is exempt from this requirement, and thereby settle the jurisdictional questions surrounding this dispute.

10. As set forth in greater detail in my Verified Statement accompanying the Petition to the Surface Transportation Board,

immediate action by the Surface Transportation Board is required to protect its jurisdiction over the embankment and to prevent the destruction of a State and local historic landmark that is eligible for listing on the National Register of Historic Places. The developer's request for an extension of time to respond is yet another tactic being used against the City of Jersey City in order for the developer to carry out his plan to devote the land to non-rail use. Once accomplished, demolition of the rail piers cannot be undone, thereby rendering the City of Jersey City and the Surface Transportation Board in effect powerless.

Pursuant to 28 U.S.C. § 1746, I declare and verify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on January 21, 2006.



John J. Curley

Fax Cover Page

To: Secretary, STB and Office of Proceeding

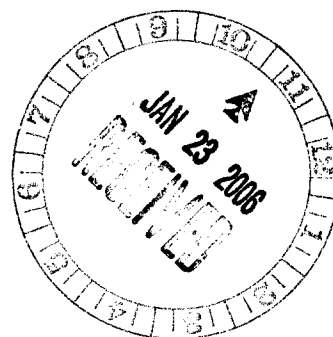
From: Charles H. Montange
426 NW 162 St.
Seattle, WA 98177

(206) 546-1936
fax: 546-3739

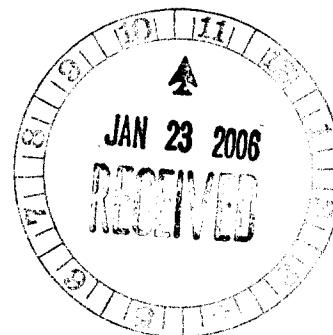
Date: 23 Jan 06

Message: For Filing.

Attached page(s): 14



CHARLES H. MONTANGE
ATTORNEY AT LAW
426 NW 162ND STREET
SEATTLE, WASHINGTON 98177
(206) 546-1936
FAX: (206) 546-3739



23 January 2006
BY FAX

Hon. Vernon Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: City of Jersey City, et al. --
Petition for a Declaratory Order,
F.D. 34818

fax filing

Please distribute immediately

Dear Mr. Williams:

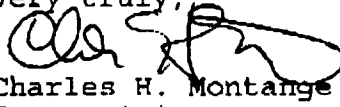
At some point on Friday, January 20, intervenors 211 Marin et al. (hereinafter "the developer") filed a petition seeking 20 additional days to reply to City of Jersey City's Petition for a Declaratory Order. This fax is to advise that City of Jersey City opposes the developer's proposed extension, because the developer is demolishing the very railroad structures that this proceeding is about, which is obviously not the sort of conduct in which a party seeking more time should be engaging. I enclose a copy (12 pages) of our Opposition by fax.

I am attempting to have eleven copies of this filing assembled in Washington, D.C. and hand-delivered for filing today (January 23).

Please advise the Office of Proceedings that we are tendering an opposition to the extension request. City of Jersey City urges that any extension be conditioned upon the entry of a housekeeping stay barring developer from further destruction of the premises pending the outcome of this proceeding.

Thank you for your assistance in this filing.

Very truly,



Charles H. Montange

for petitioners

City of Jersey City,
Rails to Trails Conservancy,
Embankment Preservation Coalition,
and NJ State Assemblyman Louis P.
Manzo

Encl.

cc. Counsel, per certificate of service
(w/encl.)